BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSHUA CHOPRA	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,013,253
TEMPORARY EMPLOYMENT CORPORATION	)	
Respondent	)	
AND	)	
	)	
TRANSPORTATION INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent and Claimant requested review of the October 20, 2011 Review and Modification and Post-Award Medical Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on February 17, 2012, in Wichita, Kansas.

APPEARANCES

Patrick C. Smith, of Pittsburg, Kansas, appeared for the claimant. Terry J. Torline, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties stipulated that the Board may consider as part of the record, the Settlement Proceedings transcript from June 13, 2005, with attachments and the transcript from the Motion hearing on January 3, 2006 with attachments.

ISSUES

The ALJ found the claimant was entitled to additional permanent partial general disability in accordance with the Court of Appeals' decision in *Lewis*[1], and awarded

[1] *Lewis v. Sun Graphics, Inc.*, No. 102,277, 237 P.3d 1272 (2010). Unpublished Court of Appeals Opinion.

claimant 117.86 weeks of additional permanent general partial disability from December 10, 2008 to March 15, 2011 and 7.86 additional weeks of permanent partial disability from July 15, 2011 to September 8, 2011 less the 26.97 weeks already paid from the settlement. The ALJ also denied respondent's motion to terminate future medical benefits.

Respondent argues that the ALJ's Award on review and modification should be reversed as claimant has not proven that he is entitled to additional benefits, that the ALJ erred in determining that claimant had a 42 percent task loss based on the opinions of Dr. Prostic when the task list provided was not credible, and that the ALJ erred in allowing the claimant to recover a work disability nearly two years prior to the date that claimant filed his application for review and modification, in violation of K.S.A. 44-528(d).

Claimant requests that the Board award compensation for work disability based on Dr. Prostic's task loss opinion and a 100 percent wage loss, with no limitation to that compensation based on the 415 week period expiring from the date of the original accident. Claimant further requests that the Board affirm the ALJ's finding that medical treatment should not be terminated.

On June 13, 2005, claimant settled his claim for a 6.5 percent impairment to the body as a whole in a running award, based upon a split of the 8 percent whole body functional impairment from Edward J. Prostic, M.D. and the 5 percent whole body functional impairment of Dr. Laurie L. Behm. The basis of the settlement was that: claimant agreed to settle on a running award for the lump sum of $7,960.05 based on a strict compromise permanent partial whole person functional disability of 6.5 percent to the body as a whole. Claimant reserved the right to future medical expense and review and modification.

Issues on Appeal

1. Did the ALJ err in finding that respondent was precluded as a matter of law from challenging causation?;
2. Did the ALJ err in denying respondent's application to terminate post-award medical care?;
3. Did the ALJ err by authorizing post-award medical care?;
4. Did the ALJ err by awarding claimant a 42 percent task loss?;
5. Did the ALJ err by granting benefits for a work disability under review and modification commencing on December 10, 2008?;
6. Did the ALJ err in finding claimant was precluded from obtaining permanent partial disability benefits for any week after September 8, 2011 and by failing to award a reasonable attorney's fee?

FINDINGS OF FACT

Claimant's original injury, a compression fracture to the thoracic spine, occurred as a result of a 17 foot fall onto cement. Claimant was off of work for seven or eight months and confined to bed. Claimant was working at Mid American Pipe at the time of this injury on September 25, 2003.

Claimant testified that since his award was entered he has stopped working for respondent and has had two other employments. The first began on August 16, 2004 and was with Missouri & Northern Arkansas Railroad as an engineer and a switchman. The engineer's job involved a lot of sitting and standing. The switchman's job involved some bending and lifting. Claimant worked mostly as an engineer. Claimant's last day with the Railroad was September 12, 2008.[2]

Claimant met with Dr. Rick Haggard[3] on May 9, 2006, for a work evaluation examination to determine if he could return to work. Dr. Haggard opined that claimant appeared to be ready to return to work despite some mild intermittent low back pain. He noted that claimant had been under the care of Dr. Laurie Behm in Joplin, Missouri and that she had returned claimant to work with no restrictions.[4] The physical evaluation determined that claimant displayed light, intermittent, persistent pain. But he appeared capable of returning to work. Claimant's back was described as being in "pretty good shape".[5] Claimant's range of motion was perfectly normal in the thoracic and lumbar spines. Although, there was mild pain with flexion of the spine past 90 degrees. The report does indicate that claimant was preparing to receive epidural injections to treat the ongoing pain complaints. Dr. Haggard determined that claimant was ready to return to work and would pose no risk for a recurrent injury, based upon his job description. Dr. Haggard's report was addressed to Timothy McCormick, D. O., MPH. Claimant had met with Dr. McCormick who works as a company physician for Missouri & Northern Arkansas Railroad.

Claimant went to the emergency room on May 5, 2008 experiencing significant back pain. He was still working for the railroad at the time. However, claimant's employment with the railroad ended on September 12, 2008. On September 22, 2008, claimant went

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[2] R.M.H. Trans. (Mar. 7, 2011) at 9.

[3] He is contracted with respondent to provide medical evaluations of the employees when they start working and when they return to work from injury.

[4] Dr. Haggard's report of May 10, 2006, appears to be intended as a return to work evaluation. However, this record does not explain why claimant sought permission to return to work in 2006, after having obtained a job with the railroad two years prior.

[5] R.M.H. Trans. (Sept. 24, 2010), Resp. Ex. C.

to work for Phoenix Mining as a heavy equipment operator. This job required a lot of sitting and walking. Claimant drove trucks and excavators on this job. Claimant's last day with Phoenix was December 10, 2008.[6]

Claimant was admitted to the Mt. Carmel Medical Center from January 17, 2009 through January 21, 2009, for treatment for abuse of alcohol and prescription drugs.[7] Claimant attributes his divorce and resulting depression to the overuse of alcohol and pain medication.

Claimant was not released from treatment with board certified anesthesiologist Bhadresh Bhakta, M.D. of the Pain Diagnosis and Treatment Center in Tulsa, Oklahoma, but testified that he has not been going for financial reasons. Claimant came to see Dr. Bhakta after Dr. Behm, the physician authorized to treat him, post award, ceased her practice of outpatient treatment to focus strictly on surgery. A letter from Dr. Bhakta to claimant's attorney, dated May 27, 2010, indicates that he is no longer providing treatment for claimant and contact should be made with Dr. Rachel Stevens, claimant's local treating physician. A letter from Dr. Steven's office at the Girard Medical Center, dated June 2, 2010, indicates that effective May 26, 2010, she had ceased providing treatment for claimant.

Claimant continued to have physical complaints as a result of his 2003 injury. He testified to muscle pain in the same location as his compression fracture. Claimant noticed the pain more when he sits or stands for too long. At the time of the Review and Modification hearing on March 7, 2011, claimant was being provided no treatment. Both Dr. Bhakta and Dr. Stevens had ceased providing treatment to claimant, which he admitted stemmed from his prescription drug abuse issues.

At the March 7, 2011, hearing claimant requested that an authorized treating physician be appointed so that he could receive medical treatment. Claimant also testified that he had applied for several jobs and was waiting for response from seven employers.

Claimant's deposition was taken on July 11, 2011. On March 15, 2011, claimant became employed with Timmons Sheet Metal through Career Employment Agency out of Bartlesville, Oklahoma. Claimant was working full-time at $12.00 an hour with an estimated 15 hours of overtime. This job required that claimant lift up to 50 pounds of sheet metal. However, any lifting over 35 pounds needed to be done by two people. Claimant's work duties included installing duct work, building duct work and building sheet metal items.

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[6] R.M.H. Trans. (Mar. 7, 2011) at 9.

[7] *Id.* (Sept. 24, 2010) at 18; McMaster Depo., Ex. 2 at 4.

Claimant testified that he was able to perform those work duties, but by the end of the day he had pain, similar to an ache in his back. Claimant had this issue before he began working for Timmons. However, claimant felt like his condition was worsening, but he hadn't seen a doctor in a while to confirm his belief.[8] He did not feel that this job was causing any permanent aggravation. Claimant was asked about long term employment and expressed concern that Timmons was talking about layoffs. Claimant's concerns were justified as he was laid off from Timmons on July 15, 2011, due to a work slowdown. Claimant testified at his deposition on August 17, 2011, that he was eligible for rehire.

Claimant, at his attorney's request, met with board certified orthopedic surgeon Edward J. Prostic M.D., on two occasions for evaluation. The first examination was on December 10, 2004. Claimant described the fall occurring on September 25, 2003. The history provided to Dr. Prostic indicated claimant was working for the railroad at the time of the examination. Claimant complained of pain in the upper lumbar spine.

Dr. Prostic noted that claimant had been found to be at maximum medical improvement by Dr. Laurie Behm on October 7, 2004. Dr. Prostic found that claimant's healed compression fracture at T12 left claimant with an 8 percent whole body functional impairment. He opined that claimant should avoid lifting weights greater than 50 pounds occasionally or 25 pounds frequently and should limit the use of vibrating equipment.[9]

The second examination was on March 28, 2011, at which time Dr. Prostic noted that claimant reported an increase in his back pain, but noted no new injuries. Claimant reported that the pain in his spine was on both sides above the waist and radiated into his buttocks. This was made worse by sitting, standing, bending, squatting, twisting, lifting, coughing and sneezing. Claimant reported stiffness in the morning and having to stretch for 10 minutes to gain relief.

Dr. Prostic opined that claimant would continue to be in need of ongoing medical treatment for the residuals of his September 25, 2003 injury and should continue at medium level employment. He testified that the claimant would not need epidural injections unless he had radicular symptoms, but would definitely need medication and physical therapy periodically.[10]

Dr. Prostic testified that some of claimant's duties as a heating and air conditioning installer were outside of his restrictions and would certainly put him more at risk for having

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[8] Claimant's Depo. (July 1, 2011) at 23.

[9] Prostic Depo., Ex. 2 at 3 (Dr. Prostic's Dec. 10, 2004 report).

[10] *Id.* at 8.

increased back symptoms.[11] He testified that he couldn't determine if claimant's increased back pain was a natural progression of his underlying disease or from his current work because he didn't sufficiently interrogate the claimant. But since claimant's treatment has been consistent over the years since 2004, it didn't seem that there was a major change because of his recent employment.

Dr. Prostic reviewed the task list of Jerry Hardin and opined that the claimant should not perform 19 out of the 45 nonduplicated tasks for a 42 percent task loss. He also agreed that if the task list was an incomplete and inaccurate description of the job tasks that the claimant performed over the last 15 years prior to his injury, so would be his task loss opinion.[12]

Claimant met with John McMaster M.D., board certified in preventive, emergency and family medicine, for an IME on December 23, 2009. Dr. McMaster was asked to evaluate claimant to determine whether the need for ongoing medical treatment and pain management was solely related to claimant's occupational injury from September 25, 2003. Dr. McMaster noted that claimant complained of chronic mid back pain that is worsened with exertion and inactivity. Dr. McMaster found no evidence of any specific neurologic impairment involving claimant's back or the nerves emanating from the spinal cord in the mid or low back.[13]

Claimant described his situation to Dr. McMaster as follows:

> I feel like a small animal in a cage that someone constantly prods with a stick, with the pain. I mostly have a very tight aching pain in my mid back a little lower on my right and a little higher on the left and there is a spot directly in the middle of my back that if I move wrong or lean up against something or bump it I would describe as being shot in the back.[14]

Dr. McMaster diagnosed claimant with status post occupational back injury; chronic, persistent, progressive mid thoracic back pain; major depressive disorder; and substance abuse in remission.

Dr. McMaster testified that in his review of claimant's medical records he could find no mention of claimant having any physical or functional impairment which would preclude him from performing the tasks of being a train engineer in his preemployment evaluation.

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[11] *Id.* at 15-16.

[12] *Id.* at 14.

[13] McMaster Depo. at 10-11.

[14] *Id.*, Ex. 3 at 5 (IME Questionnaire dated Dec. 23, 2009).

Claimant had been cleared medically to perform the work of a train engineer and a heavy equipment operator for a coal mine. However when Dr. McMaster saw claimant in 2009, he did not feel that the claimant would be able to perform railroad work due to his chronic low back complaints and his use of controlled medications as prescribed.

He opined that the medical care claimant received after 2005 was not medically necessitated for the treatment of any condition, injury or illness felt to have been sustained from the events of September 2003.[15] He also opined that the vibration from the heavy equipment operator job and the railroad job could be one explanation for why claimant complained of pain and the need for ongoing medical treatment.[16]

Dr. McMaster testified that, based on the information available to him, he was unable to causally relate the occurrence of injuries sustained on September 25, 2003 to claimant's ongoing need for medical treatment and pain management.[17] He went on to assign a 5 percent whole person impairment based on the Injury Model, DRE Category II of the 4th edition of the AMA *Guides*. Dr. McMaster provided no task loss analysis.

Jerry Hardin conducted a telephone interview with the claimant on May 17, 2011. A task list was compiled from all of the jobs claimant has had over the last 15 years prior to his injury. Since claimant's interview with Mr. Hardin he has been laid off. Mr. Hardin agrees that claimant has the capability to earn wages that are equal to or higher than his average weekly wage at Manpower.[18]

On April 30, 2010, respondent filed a K-WC E-5 Application for Review and Modification with the Division of Workers Compensation (Division) for the State of Kansas contending that the Award granting future medical benefits should be terminated since claimant's current need for treatment was caused by subsequent injury(ies) with new employer(s). On September 27, 2010, claimant filed an E-5 with the Division requesting review of whether the functional impairment and work disability had increased. Both pleadings are contained in the Division's administrative file.

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[15] *Id.* at 12.

[16] *Id.* at 27.

[17] *Id.*, Ex. 2 at 12 (Dr. McMaster's Dec. 23, 2009 IME report).

[18] Hardin Depo. at 25.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[19]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[20]

K.S.A. 44-528(a)(d) states:

> (a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.
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> . . .
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> (d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

Both claimant and respondent filed a separate E-5 in this matter, although for clearly different reasons. Respondent contests claimant's right to future medical treatment, while claimant requests a modification of claimant's disability. The ALJ, in the Award discusses the right of a party to "relitigate" an issue after filing a motion for review and modification. The ALJ is correct in his discussion of the doctrine of res judicata as it may

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[19] K.S.A. 44-501 and K.S.A. 44-508(g).

[20] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

apply to the issue of causation during a modification hearing, citing *Randall* in support of his ruling.[21] In *Randall* the Kansas Supreme Court held that res judicata applies to foreclose "a finding of a past fact which existed at the time of the original hearing." The Kansas Court of Appeals in *Scheidt*[22] held that a workers' compensation award, in most respects, is like a court judgment and subject to res judicata. On that point the ALJ is correct. However, in the award the ALJ cites the settlement award "Basis of settlement" which states "Claimant specifically reserves the right to future medical expenses....". He goes on to state that by awarding post award medical care, Judge Hursh, (the ALJ at the settlement hearing) implicitly found the need for treatment to be related to the original injury. The ALJ notes that no appeal of the settlement or the judge's award was taken.

This respondent is not appealing the right to past medical treatment or whether claimant suffered the original injury in 2003. Respondent, instead, contends that claimant's current need for medical treatment stems from more recent employment relationships and intervening injuries suffered while performing those jobs. Those issues were not determined at the time of the settlement hearing. Over those issues res judicata would not apply. Both the ALJ and the Board have jurisdiction over a question of intervening injury and the need for medical treatment as it relates to the original injury versus an intervening injury. The ALJ went on to state that there was no evidence in the record of additional injury beyond his original injury of September 25, 2003. The determination of additional injury from claimant's intervening employments would not be limited, in this circumstance, by res judicata after the date of the June 13, 2005 Agreed Award.

Having so determined, the Board will next decide whether claimant's employment with the railroad, the mining company and the heating and air company caused a permanent worsening of his back condition leading to the need for additional medical treatment. Claimant was provided specific restrictions by Dr. Prostic in 2004. Those restrictions limited claimant to no lifting greater than 50 pounds occasionally or 25 pounds frequently and limited the use of vibrating equipment. None of the jobs claimant performed after leaving respondent violated those restrictions. Even the heating and air job, which required lifting on a regular basis restricted lifting above 35 pounds to require two persons. Neither the railroad job, nor the mining included lifting above Dr. Prostic's restrictions. Additionally, while claimant testified to ongoing pain in his back, he also stated that none of the more recent jobs caused him permanent harm. Dr. Prostic agreed.

Dr. McMaster testified that claimant's subsequent employments with the railroad and the mining company could be aggravating factors in claimant's ongoing need for medical treatment. Additionally, Dr. McMaster determined from his review of the medical records that claimant had reached maximum medical improvement in 2004. He acknowledged that

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[21] *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 510 P.2d 1190 (1973).

[22] *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, 211 P.3d 175 (2009)

the records also noted ongoing subjective symptoms thereafter, which he judged were unrelated to the 2003 incident. He rejected claimant's argument that the ongoing medical treatment by the authorized treating physicians Dr. Behm and Dr. Bhakta indicated ongoing problems stemming from the original injury.

In general, the question of whether the worsening of a claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether the claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[23]

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[24]

However, the Kansas Supreme Court, in *Stockman,*[25] stated:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, the claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[26] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

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[23] *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[24] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[25] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P. 2d 697 (1973); *see also Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

[26] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

The above cases distinguish between a continuing disability resulting from complications of an initial injury and a new, distinct traumatic event that is beyond a mere aggravation. The continuing disability which is aggravated is compensable as a natural consequence of the original injury, while the increased disability from a new separate non-work-related accident is not. If the second injury or disability was produced by a significant or traumatic event, involving substantial force or unusual exertion, the second injury will constitute an intervening cause and, therefore, a new and separate accident.

The Board finds that Dr. Prostic, having had the opportunity to examine claimant both shortly after the original accident, and in 2011, had a more informed view of claimant's ongoing and long term need for medical care as it relates to claimant's injuries from the accident on September 25, 2003. Claimant has satisfied his burden of proving that his condition has worsened and that the worsening and the need for medical treatment is a natural consequence of his original 2003 injury. Claimant's employment experiences since that time caused only temporary aggravations of the original injury.

K.S.A. 44-510k(a)(b) states:

> (a) At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.
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> (b) Any application for hearing made pursuant to this section shall receive priority setting by the administrative law judge, only superseded by preliminary hearings pursuant to K.S.A. 44-534a and amendments thereto. The parties shall meet and confer prior to the hearing pursuant to this section, but a prehearing settlement conference shall not be necessary. The administrative law judge shall have authority to award medical treatment relating back to the entry of the underlying award, but in no event shall such medical treatment relate back more than six months following the filing of such application for post-award medical treatment. Reviews taken under this section shall receive priority settings before the board, only superseded by reviews for preliminary hearings. A decision shall be rendered by the board within 30 days from the time the review hereunder is submitted.

Respondent contests claimant's entitlement to ongoing medical treatment for the injuries suffered from the accident on September 25, 2003. However, the above finding that claimant's ongoing problems stem from the 2003 accident and not the more recent employments resolves that issue in claimant's favor.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[27]

The only task loss opinion in this record is that of Dr. Prostic who determined that claimant had lost the ability to perform 42 percent of the tasks he performed in the 15 years preceding the accident. Respondent contends the task list is incomplete, having omitted three of claimant's prior jobs. Additionally, respondent argues that, as claimant provided the task loss information utilized by Mr. Hardin in preparing the list, and as claimant admitted during his testimony that he lied when applying for post injury employment, claimant is not credible. Therefore, any determination by a physician or vocational expert based upon claimant's word is also not credible. However, respondent offers no task loss opinion to contradict that of Dr. Prostic. Additionally, claimant lied on employment applications to obtain a job, after being unemployed for two years. This action, while not appropriate, does not make claimant unbelievable in all aspects of this litigation. Additionally, the three jobs that were omitted from the task list were not designated in this record as having occurred during the mandated 15 year period leading up to the accident. It does not appear, from this record, that the omission of those jobs was intentional. It also is unclear when those jobs were performed. The Board finds the task loss opinion of Dr. Prostic to be credible. It is adopted for the purposes of this award.

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[28]

Claimant was employed at a comparable wage through December 10, 2008. He was unemployed until March 15, 2011. At that point, he obtained a job working at a comparable wage until July 15, 2011. Claimant would be limited to his functional impairment during those periods of comparable wage employment.

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[27] K.S.A. 44-510e.

[28] K.S.A. 44-510e.

The ALJ awarded claimant a work disability under K.S.A. 44-510e effective December 10, 2008. However, K.S.A. 44-528 limits the effective date of a claimant's entitlement to the review and modification of an award to six months prior to the date the application for review and modification was made.[29]

Both claimant and respondent filed applications to review and modify this award. Respondent's application, filed on April 30, 2010, requested that the medical treatment being provided to claimant be terminated due to the alleged intervening injuries. Claimant's application, filed on September 27, 2010, argued that claimant's functional impairment and work disability had increased. Claimant contends that either application filing date would be proper to determine the appropriate six month relation back date. Only claimant's application raises the issues dealing with functional impairment and work disability. The Board finds that the six month limit contained in the statute would more properly be applied using claimant's application date of September 27, 2010. Therefore, any review and modification of claimant's functional impairment and/or work disability will be effective on March 27, 2010. The ALJ erred in allowing the modified work disability to begin on December 10, 2008.

Claimant next argues that the 415 week limit contained in K.S.A. 44-510e(a) does not apply to review and modification proceedings. However, that issue was addressed by the Kansas Court of Appeals in *Ponder-Coppage*. The *Ponder-Coppage* Court found the 415 week period to be a limitation on permanent partial disability compensation. The Court went on to state that K.S.A. 44-528 is "not a statute of limitations" stating that the effective date language in K.S.A. 44-528 benefits both parties. The Court went on to affirm the Board's decision that 415 weeks from the date of accident is the maximum number of weeks for which a claimant is entitled to permanent partial disability compensation.

The Board finds that the ruling in *Ponder-Coppage* applies to this situation. Claimant is granted a permanent partial general (work) disability award effective March 27, 2010, through March 14, 2011 and again on July 16, 2011 through September 8, 2011, based upon a task loss of 42 percent and a 100 percent wage loss. Pursuant to K.S.A. 44-510e, the determination by the ALJ that claimant's permanent partial general disability has increased to 71 percent is affirmed. However, the award of the ALJ is modified to reflect the appropriate dates during which the award shall be paid.

Claimant, in his application for review by the Board raised an issue dealing with the ALJ's failure to award a reasonable attorney fee. The ALJ did not list this as an issue in the award and failed to address it as well. Additionally, claimant failed to provide any argument in his brief to the Board on this issue. The Board is limited by K.S.A. 44-555c(a) in it's review of an award to questions of law and fact presented to the ALJ. Here, the issue of attorney fees doesn't appear to have been presented to nor decided by the ALJ. Should

[29] See also: *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002).

claimant desire an award of attorney fees, a hearing before the ALJ on the issue would be appropriate under K.S.A. 44-536.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified with regard to the dates during which the permanent partial general disability is awarded but affirmed in all other regards. Claimant is awarded a 71 percent permanent partial general disability based upon a 42 percent task loss and a 100 percent wage loss. The modification shall be effective during the period from March 27, 2010 through March 14, 2011 and July 16, 2011 through September 8, 2011.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 20, 2011, is affirmed with regard to the finding that claimant has suffered a 71 percent permanent partial general disability, but modified to limit the modified award to the period from March 27, 2010 through March 14, 2011 and July 16, 2011 through September 8, 2011.

Claimant is entitled to 58.00 weeks of permanent partial general disability compensation at the rate of $295.09 per week for the periods from March 27, 2010 through March 14, 2011 and July 16, 2011 through September 8, 2011, totaling $17,115.22. As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of March, 2012.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned concur with the findings and conclusions of the majority except as to the effective date of the Award upon review and modification. K.S.A. 44-528(d) provides:

> Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

We would utilize the filing date of the Application for Review and Modification filed first for purposes of K.S.A. 44-528(d) rather than the one filed second. As such, claimant would be entitled to obtain review and modification of benefits commencing six months prior to April 30, 2010 rather than the September 27, 2010 date utilized by the majority. Once the issue of review and modification was before the ALJ, the Judge was not limited to the single issue of medical treatment as the majority finds.

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge